Filed 2/27/19 Kryvoshey v. AHMSI Default Services, Inc. CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

LILIA KRYVOSHEY, Plaintiff and Appellant, v. AHMSI DEFAULT SERVICES, INC., et al., Defendants and Respondents.	C078308 (Super. Ct. No. 34-2011-00104315CUORGDS)

After plaintiff Lilia Kryvoshey defaulted on a loan secured by her home and the home was sold in a trustee's sale, she sued defendants AHMSI Default Services, Inc. (AHMSI) and Deutsche Bank National Trust Company (Deutsche Bank), along with other defendants not parties to this appeal, for wrongful foreclosure and other tort and contract causes of action.[1] The trial court sustained a demurrer to the complaint without leave to amend, and Kryvoshey now appeals the ensuing judgment.

Kryvoshey contends (1) her causes of action are not barred by the statute of limitations because she did not sustain damages until defendants foreclosed, (2) the complaint sufficiently pleaded causes of action for breach of contract, negligence, and fraud, based on defendants' failure to offer her a permanent loan modification in 2009

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[1] We refer to defendants collectively except when recounting particular actions. Because defendants filed briefing jointly and have not tried to apportion potential liability, we leave that to further proceedings.

after she successfully completed a Trial Period Plan (TPP) under the Home Affordable Modification Program (HAMP), (3) the complaint sufficiently pleaded causes of action for promissory estoppel and fraud, based on defendants' promise in 2010 to modify the terms of an in-house loan modification (not under HAMP) provided she signed the agreement before the terms were modified, (4) the complaint sufficiently pleaded an unfair competition cause of action based on the alleged events in 2009 and 2010, and (5) the complaint sufficiently pleaded a wrongful foreclosure cause of action based on irregularities in the transfer of her loan.

This matter was reassigned to the current author and panel in November 2018. We conclude (1) Kryvoshey's causes of action are not time-barred, (2) the trial court improperly sustained the demurrer on the causes of action for breach of contract, negligence, and fraud, based on defendants' 2009 conduct, (3) the trial court improperly sustained the demurrer on the causes of action for promissory estoppel and fraud, based on defendants' 2010 conduct, (4) the trial court properly sustained the demurrer without leave to amend on the unfair competition cause of action, and (5) Kryvoshey must be given the opportunity to amend the wrongful foreclosure cause of action on remand, even though the demurrer was properly granted on that cause of action as pleaded.

BACKGROUND

In reviewing the sustaining of a demurrer, we accept as true all well-pleaded facts.[2] (*Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460 (*Connerly*).)

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[2] Both Kryvoshey and defendants have inserted into their statements of facts in the briefing various facts not alleged in the operative second amended complaint along with conclusions of law concerning the facts. This practice is inconsistent with the standard of review after the sustaining of a demurrer and is an attempt to introduce extraneous facts, which we must disregard on review of the sustaining of a demurrer, and disputed conclusions of law, which are for the court to determine.

We construe the complaint liberally "with a view to substantial justice between the parties." (Code Civ. Proc., § 452.)

The causes of action in the operative second amended complaint were based on actions of defendants after Kryvoshey sought to modify her $490,000 adjustable rate loan secured by a deed of trust on her home in 2009.

On October 5, 2009, AHMSI sent Kryvoshey a letter "to start [her] three-month trial period for mortgage loan modification" under the "Home Affordable Modification Program." AHMSI informed Kryvoshey, "we may be able to provide a more affordable mortgage payment." The letter continued: "For a three-month period, instead of making your existing mortgage payment, you will now make the new trial period mortgage payment of $1,425.00[.] [¶] . . . If we determine that you are not eligible for a permanent modification under the Home Affordable Modification Program, we will contact you to review other options."[3]

Kryvoshey performed all the requirements stated in the AHMSI letter, including making three monthly payments of $1,425 (2009 TPP).[4] However, on May 26, 2010, AHMSI sent Kryvoshey a letter informing her that she was not eligible for the HAMP loan modification. The letter stated that her loan failed the Net Present Value (NPV) test under HAMP because "the cash flow produced from modifying the Loan is expected to provide a lower return to the investor than proceeding with a foreclosure action."

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[3] For a summary of the federal HAMP legislation and guidelines, see *Wigod v. Wells Fargo Bank N.A.* (7th Cir. 2012) 673 F.3d 547, 556-557.

[4] In the second amended complaint, Kryvoshey made conflicting allegations about whether she made all three payments under the TPP. As noted above, she alleged she made all three payments, but she also alleged, elsewhere, that she was prevented from making the third payment. Construed liberally, the complaint sufficiently alleged Kryvoshey made all three payments.

In October 2010, AHMSI offered Kryvoshey an "in-house" loan modification (2010 in-house modification), not under HAMP. This modification provided that $74,972.93, representing delinquent interest, costs, and fees, would be capitalized -- that is, added to the principal of the loan -- making the new principal amount $592,229.38. The new monthly payment on principal and interest would be $1,778.97, with scheduled increases in interest rate and monthly payment until the monthly payment on principal and interest would reach $2,479.31 in 2017 and remain there for the remainder of the loan. Because the monthly payments would be insufficient to fully pay off the loan, a balloon payment of $323,967.13 would be due at the end of the loan period.

When Kryvoshey received the offer, she spoke to a representative of AHMSI. The representative told Kryvoshey that, if Kryvoshey would sign the loan modification agreement as written as a "showing of good faith," AHMSI would eliminate the $74,972.93 amount to be capitalized, restructure the loan so there would be no balloon payment, and fix the monthly payments at $1,778 for the life of the loan. Relying on these representations, Kryvoshey signed the loan modification agreement without the amendments. AHMSI did not amend the loan agreement.

On May 16, 2012, Power Default Services, Inc., as substitute trustee, sold Kryvoshey's home in a trustee's sale. Deutsche Bank bought the home in a creditor's bid.

Additional allegations are recounted in the discussion as relevant to the contentions on appeal.

On June 2, 2011, Kryvoshey, representing herself, filed a complaint in Sacramento County Superior Court against AHMSI, Deutsche Bank, and others. The complaint alleged causes of action for negligence, fraud, breach of the implied covenant of good faith and fair dealing, and violations of statutes. We need not recount the allegations of the original complaint; it is sufficient to note that Kryvoshey did not allege facts relating to the 2009 TPP or the 2010 in-house loan modification.

On January 23, 2014, Kryvoshey, represented by counsel, filed a first amended complaint alleging new causes of action and alleging facts relating to the 2009 TPP or the 2010 in-house loan modification. The trial court sustained a demurrer to the first amended complaint but gave Kryvoshey leave to amend some of the causes of action.

On July 23, 2014, Kryvoshey filed her second amended complaint, the operative complaint here, asserting the following causes of action:

- First cause of action, wrongful foreclosure based on a void assignment of the deed of trust.
- Second cause of action, promissory estoppel based on the oral promise inducing her to sign the 2010 in-house loan modification agreement.
- Third cause of action, breach of contract to modify the loan under HAMP after completion of the 2009 TPP.
- Fourth cause of action, negligence in failure to modify the loan under HAMP after the completion of the 2009 TPP.
- Fifth cause of action, fraud in promising to modify the 2010 in-house loan modification agreement.
- Sixth cause of action, fraud in representing to Kryvoshey that she would receive a HAMP loan modification after completing the 2009 TPP.
- Seventh cause of action, violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200) based on the events surrounding the 2009 TPP and the 2010 in-house modification.

Defendants again demurred, and the trial court sustained the demurrer without leave to amend. The trial court entered judgment in favor of AHMSI and Deutsche Bank.

DISCUSSION

I

Kryvoshey contends her causes of action are not barred by the statute of limitations because she did not sustain damages until defendants foreclosed. Defendants

counter that the sustaining of the demurrer without leave to amend was proper as to the claims relating to the 2009 TPP and the 2010 in-house loan modification because those claims are barred by the statute of limitations. Defendants' statute-of-limitations argument applies to all causes of action except the first cause of action for wrongful foreclosure. Defendants argue we should consider this statute of limitations defense, even though it was not raised in the trial court, because we affirm the sustaining of a demurrer on any proper ground. (See *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880, fn. 10.)

Kryvoshey did not allege the facts and causes of action concerning the 2009 TPP and the 2010 in-house loan modification until 2014, when she filed her first amended complaint. Therefore, she filed the first amended complaint more than three years after the alleged events. Defendants argue that, even if the discovery rule is invoked, Kryvoshey discovered her claims by May 2010 when AHMSI sent her the letter informing her that she did not qualify for a HAMP loan modification.

The applicable statutes of limitation are, at most, three years: two years for an action based on an oral obligation (Code Civ. Proc., § 339) and three years for fraud (Code Civ. Proc., § 338, subd. (b)). A statute of limitation begins to run when the claim accrues. (Code Civ. Proc., § 312.) As a general rule, a claim accrues when the last element required for that claim occurs. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) When damages are an element of the cause of action, the claim does not accrue until the damages are sustained. (*City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 886.) Damages are an element of both tort and contract causes of action alleged by Kryvoshey. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060 [tort]; *Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1468 [breach of contract].)

Defendants' contention that the second through sixth causes of action in the complaint were time-barred is without merit because the causes of action did not

accrue until Kryvoshey suffered the alleged damage, financial loss up to and including foreclosure. (*San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [tort cause of action does not accrue until all elements, including damage, occur]; *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1391 [same for contract cause of action].) Because the trustee's sale did not take place until May 2012, Kryvoshey's causes of action were not time-barred because she alleged them in January 2014, less than two years after the trustee's sale. As pleaded, the causes of action are not barred by the statute of limitations.

II

Kryvoshey next claims the complaint sufficiently pleaded causes of action for breach of contract, negligence, and fraud, based on defendants' failure to offer her a permanent loan modification in 2009 after she successfully completed a TPP under the HAMP. Kryvoshey's third cause of action for breach of contract, fourth cause of action for negligence, and sixth cause of action for fraud relate to Kryvoshey's allegations that, in 2009, she was offered and completed a TPP under the federal HAMP guidelines. We address each of those causes of action in turn.

A

The elements of a breach of contract cause of action are (1) a contract, (2) the plaintiff's performance on the contract or excuse for not performing on the contract, (3) the defendant's breach of the contract, and (4) damages caused by the defendant's breach of the contract. (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1109.) "The test for causation in a breach of contract . . . action is whether the breach was a substantial factor in causing the damages." (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 909.)

As Kryvoshey notes, we determined in *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915 (*Bushell*) that a lender's agreement to a TPP under HAMP

constitutes a contract to provide a permanent modification of the loan if the borrower complies with the terms of the TPP. In *Bushell*, Chase Bank entered into a TPP with the plaintiffs. Even though the plaintiffs made the payments in full under the TPP, Chase Bank told them their HAMP application was denied. When the plaintiffs called for an explanation, they were told by Chase Bank that they should stop making payments altogether while it was " 'crunching the numbers.' " Chase Bank then started the foreclosure process. (*Id*. at pp. 919-921.) We held the plaintiffs' breach of contract cause of action was viable because the plaintiffs had performed all obligations under the TPP and were contractually entitled to the modification. (*Id*. at pp. 926-931.)

Defendants attempt to distinguish *Bushell, supra*, 220 Cal.App.4th 915, and the similar holding in *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780 (*West*), as follows: "The servicers in those cases initiated foreclosure before denying the borrowers' HAMP loan modification applications and never offered the borrowers any loan modification of any sort. [Cites to *Bushell* and *West*.] Here, in contrast, after denying Kryvoshey's HAMP application, AHMSI did not immediately foreclose. It offered Kryvoshey an in-house modification with terms consistent with what she would have received under HAMP." (Fn. omitted.)

This attempt to distinguish *Bushell, supra*, 220 Cal.App.4th 915 is unsuccessful. Defendants do not explain why the initiation of foreclosure proceedings before breaching the HAMP contract instead of after breaching the contract is significant for purposes of this breach of contract cause of action. Also, defendants assert that the in-house modification was consistent with what Kryvoshey would have received under HAMP. But that is a factual issue and does not appear on the face of the pleadings. Accordingly, under *Bushell*, Kryvoshey properly pleaded a cause of action for breach of contract.

The trial court ruled that the complaint did not state a cause of action for breach of contract because AHMSI informed her she did not qualify for the program and because she agreed to "walk away" from the program when she signed the 2010 in-house loan

modification agreement. But consistent with *Bushell, supra*, 220 Cal.App.4th 915, AHMSI entered into a contract to provide a HAMP loan modification by enrolling Kryvoshey in a TPP. Informing her later that she did not qualify breached the contract. And Kryvoshey only walked away from the HAMP contract after defendants breached it.

Instead of defending the grounds relied on by the trial court, defendants now assert that Kryvoshey's damages were not caused by defendants' breach of contract. Defendants base this assertion on the fact that she was offered an in-house loan modification. They argue: "To establish causation for her breach of contract claim, Kryvoshey would have to aver facts showing that the 'in-house' modification was materially different from the HAMP modification she claims she was entitled to." Defendants provide no authority for such a pleading requirement, and we know of none. Instead, we conclude Kryvoshey's allegation that she suffered foreclosure as a result of defendants' breach of the contract to offer her a HAMP loan modification was sufficient to allege causation.

The trial court should not have sustained the demurrer to the third cause of action for breach of contract.

B

To support a negligence cause of action, a plaintiff must plead and prove the defendant owed the plaintiff a legal duty, the defendant breached the duty, and the breach was a proximate or legal cause of the plaintiff's injuries. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.) Kryvoshey's second amended complaint alleged that, after AHMSI placed her in a TPP, AHMSI owed her "a duty of care to process and apply the HAMP requirements" and "not to misinform [Kryvoshey] about the HAMP loan modification process" or "make material misrepresentations regarding the status of an application for a loan modification and/or regarding the status of a foreclosure." The second amended complaint alleged AHMSI breached this duty "when on May 26, 2010 AHMSI issued a letter . . . [¶] . . . to [Kryvoshey] denying [Kryvoshey] a permanent loan modification

because . . . she failed the HAMP Net Present Value (NPV) test." Because AHMSI negligently breached this duty of care, Kryvoshey was not offered a permanent loan modification under HAMP that she could afford. Instead, AHMSI's breach of the duty caused issuance of a notice of default and foreclosure.

"[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) In those cases that fall outside the "general rule," we engage in a balancing of factors set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 (*Biakanja* factors). (*Nymark,* at p. 1098.) "[T]he test for determining whether a financial institution owes a duty of care to a borrower-client ' "involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." ' " (*Ibid.*)

Courts have found a duty, after applying the *Biakanja* factors, if the lender or servicer has undertaken to renegotiate a loan modification but breached the duty to exercise reasonable care in processing the loan modification application. (See, e.g., *Rossetta v. CitiMortgage, Inc.* (2017) 18 Cal.App.5th 628 (*Rossetta*); *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 946, 949; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 881.)

Here, Kryvoshey alleged AHMSI entered into the HAMP loan modification process, not just negotiations over whether to offer a loan modification, when it enrolled her in a TPP. Thus, AHMSI did more than merely receive or review Kryvoshey's loan modification application. Given these additional allegations, the general rule that a lender or servicer has no duty to offer a loan modification does not apply.

Defendants contend Kryvoshey failed to state a cause of action for negligence because AHMSI owed Kryvoshey no duty of care under the *Biakanja* factors. However, there is no material difference between the facts of *Rossetta, supra*, 18 Cal.App.5th 628 and the facts alleged here. AHMSI voluntarily entered into the HAMP loan modification process by offering Kryvoshey a TPP, and, after Kryvoshey complied with the TPP, AHMSI refused to execute its obligations under HAMP. The second amended complaint alleged AHMSI's claim that Kryvoshey's loan did not meet the NPV test was a violation of the HAMP requirements because HAMP requires the lender or servicer to undertake the NPV test before offering a TPP. Defendants make no attempt to rebut that assertion.

Defendants further contend Kryvoshey failed to allege causation and damages. But Kryvoshey alleged her property would not have been subject to foreclosure if defendants had offered her a proper HAMP loan modification. We reject defendants' claim that Kryvoshey had a burden in opposing the demurrer to establish that a HAMP loan modification would have been more favorable to her than the in-house loan modification AHMSI actually offered. That claim is factual and does not lend itself to resolution on demurrer.

The trial court should not have sustained the demurrer on the fourth cause of action for negligence. In light of this conclusion, we need not consider Kryvoshey's additional argument, made for the first time in her reply brief, that her negligence cause of action is viable under a theory of negligence per se. (See Evid. Code, § 669.)

C

" ' "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." [Citations.]' (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 [49 Cal.Rptr.2d 377, 909 P.2d 981] (*Lazar*).) Each element must be alleged with particularity. (*Conrad v. Bank of America* (1996) 45 Cal.App.4th

133, 156 [53 Cal.Rptr.2d 336].)" (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060 (*Beckwith*).)

" 'A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.]' (*Lazar, supra*, 12 Cal.4th at p. 638.) Thus, in a promissory fraud action, to sufficiently allege defendant made a misrepresentation, the complaint must allege (1) the defendant made a representation of intent to perform some future action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent at the time that the promise was made, i.e., the promise was false. (*Id*. at p. 639.)" (*Beckwith*, *supra*, 205 Cal.App.4th at p. 1060.)

Kryvoshey's sixth cause of action alleged AHMSI's letter to her inviting her to participate in the TPP was a representation that she "had already been pre-qualified to enter into the Trial Period Plan by having passed the NPV test administered by AHMSI." The cause of action further alleged defendants knew the representation was not true and made the representation with intent to deceive.

In its order sustaining defendants' demurrer, the trial court wrote that Kryvoshey's "Sixth Cause of Action alleges that it was fraudulent for AHMSI to deny [Kryvoshey] a permanent loan modification after [Kryvoshey] entered into a TPP. [Kryvoshey] provides no authority for this assertion because no such authority exists. Mere denial of a loan modification based on the NPV calculation cannot constitute fraud."

We conclude, however, that the pleading was sufficient even though AHMSI may not have expressly promised Kryvoshey an offer of a permanent HAMP loan modification if she successfully completed the TPP. In *West, supra*, 214 Cal.App.4th at page 797, the court held that HAMP guidelines require the lender or servicer to offer a permanent HAMP loan modification if the borrower complies with the TPP. Therefore, a promise to offer a permanent HAMP loan modification may be implied in the offer of a TPP.

Defendants argue the complaint "fails to explain . . . how [Kryvoshey] relied on this purported concealment or how she was damaged as a result." But her completion of the TPP constituted justifiable reliance. And the resulting foreclosure, with its associated costs and consequences, was a sufficient allegation of resulting damages. The trial court should not have sustained the demurrer on the sixth cause of action for fraud.

III

Kryvoshey argues the complaint sufficiently pleaded a second cause of action for promissory estoppel and a fifth cause of action for promissory fraud (distinct from the sixth cause of action for fraud addressed in the prior section), based on defendants' promise in 2010 to modify the terms of an in-house loan modification (not under HAMP) provided she signed the agreement before the terms were modified. Once again, we address each cause of action in turn.

A

" ' "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." ' (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310 [96 Cal.Rptr.2d 747, 1 P.3d 63], quoting Rest.2d Contracts, § 90.) . . . Courts are given wide discretion in [the application of promissory estoppel]. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 902 [28 Cal.Rptr.3d 894].) 'The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." [Citation.]' (*Id*. at p. 901.)" (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 944-945.)

According to the allegations in the complaint, an unidentified representative of AHMSI told Kryvoshey that if Kryvoshey would sign the 2010 in-house loan

modification agreement as a showing of good faith, AHMSI would "eliminate the total amount to be capitalized of $74,972.93, as well as restructuring the loan so that there would be no balloon payment in the amount of $323,967.13." The representative also told Kryvoshey the loan payments "would remain fixed at $1,778 for the life of the loan." In reliance on the oral promise, Kryvoshey signed the 2010 in-house loan modification agreement, which she would not have signed without the oral promise. As injury caused by defendants' failure to keep the representative's oral promise, Kryvoshey alleged: "But for AHMSI's promise, [Kryvoshey] would have pursued other alternatives to foreclosure including remaining in the prior HAMP trial period plan which had been offered to her by AHMSI, attempting to have refinanced the property, and attempting to sell the property prior to her having defaulted on the loan."

Applying the elements to the facts alleged in the complaint, we conclude (1) AHMSI made a clear and unambiguous promise to modify the terms of the in-house loan modification agreement, (2) Kryvoshey relied on the promise by signing the in-house loan modification agreement as written, (3) her reliance was reasonable because the promise was made by an AHMSI representative and foreseeable because the promise was made expressly to induce Kryvoshey to sign the unmodified in-house loan modification agreement, and (4) Kryvoshey was injured by this reliance because she was induced to sign an agreement with which she could not comply rather that remain in the statutory HAMP process, sell the property, or engage in other alternatives to foreclosure. Construing the complaint liberally, we may also infer that she would not have suffered the costs associated with her default on the modified loan and loss of all or part of any equity she had in the home.

Defendants argue Kryvoshey did not allege facts suggesting any of the purported alternatives were viable, referring to the alternatives of remaining in the HAMP program, selling the property, or finding another alternative to foreclosure. But they do not cite authority holding that a plaintiff must allege "viability."

B

Kryvoshey's fifth cause of action alleged promissory fraud based on the same allegations made in the second cause of action relating to the oral promise inducing Kryvoshey to sign the 2010 in-house loan modification. Kryvoshey further alleged AHMSI did not intend to perform on the oral promise when the oral promise was made.

The trial court sustained the demurrer as to this cause of action because, to establish promissory fraud in a case in which the statute of frauds would apply, the plaintiff must produce evidence of the defendant's intent not to perform on the promise. Mere nonperformance is insufficient. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30.) While the law cited by the trial court is accurate, the requirement that a plaintiff produce evidence to overcome a demurrer is not. At the pleading stage, an allegation that the defendant did not intend to perform on the promise when the promise was made is sufficient, subject to later proof. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869 [demurrer tests legal sufficiency of complaint, not factual issues].)

The allegations were sufficient to support a cause of action for promissory fraud, and the statute of frauds does not bar the cause of action. (See *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1183, citing *Tenzer v. Superscope, Inc.*, *supra*, 39 Cal.3d at p. 30 [the rule intended to prevent fraud should not be applied to allow a party to hide behind the statute of frauds].)

IV

Kryvoshey argues the complaint sufficiently pleaded an unfair competition cause of action based on the alleged events in 2009 and 2010.

Kryvoshey's seventh cause of action alleged unfair competition under Business and Professions Code section 17200, based on both the 2009 HAMP TPP and the 2010 in-house loan modification. According to the complaint, the conduct alleged as to the 2009 HAMP TPP and the 2010 in-house loan modification constituted unlawful, unfair,

and fraudulent business practices. As a result of those practices, Kryvoshey incurred damages, including late fees and penalties, and she sought restitution and disgorgement of those fees and penalties. The trial court sustained the demurrer, ruling that Kryvoshey has no standing and she has not been injured as a result of the allegedly unfair competition.

Business and Professions Code section 17200 permits civil recovery for "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." In *West*, the court concluded a plaintiff could allege a cause of action under Business and Professions Code section 17200 based on unfair and fraudulent business practices by alleging the lender engaged in the practice of making TPP's that did not comply with HAMP guidelines, made misrepresentations regarding a borrower's rights and foreclosure sales, and wrongfully conducted trustee's sales when the borrower was in compliance with a TPP. (*West, supra,* 214 Cal.App.4th at p. 806.) Here, Kryvoshey alleged similar violations of HAMP guidelines and fraudulent practices.

Defendants contend the trial court's sustaining of the demurrer as to this cause of action was proper because she does not have standing to sue under Business and Professions Code section 17200 and the remedies she seeks are not available. Defendants claim disgorgement is not available as a remedy because this is an individual action. While this argument is correct (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1148 (*Korea Supply*) [nonrestitutionary disgorgement unavailable in statutory unfair competition action]), Kryvoshey also seeks restitution, a remedy available in an individual action under Business and Professions Code section 17200. Kryvoshey alleged she "seeks restitution and disgorgement based on fees associated with, but not limited to late fees and penalties incurred with servicing the subject loan, and such other relief afforded under Cal. Bus. & Prof. § 17200, et seq. . . . [¶] . . . to seek discouragement [*sic*] of property for actual losses as she has actually lost her home."

The fatal problem with Kryvoshey's claim for restitution under Business and Professions Code section 17200 is that she alleged she "incurred" the fees and penalties, not that she paid the fees and penalties. Restitution under the statute is limited to "return of money or property that was once in [Kryvoshey's] possession" or "money or property in which . . . she has a vested interest." (*Korea Supply, supra,* 29 Cal.App.4th at p. 1149.) Kryvoshey did not allege former possession of or a vested interest in any money held by defendants.

Furthermore, Kryvoshey does not explain how she could amend the complaint to remedy this shortcoming. Accordingly, the trial court properly sustained the demurrer on the seventh cause of action for violation of Business and Professions Code section 17200.

V

Finally, Kryvoshey contends the complaint sufficiently pleaded a wrongful foreclosure cause of action based on irregularities in the transfer of her loan.

Kryvoshey contends her first cause of action for wrongful foreclosure against the holder of her deed of trust is viable because she alleged the transfer of her loan to a trust was void, instead of voidable. In a prior case, we rejected this contention because such transfers are merely voidable under New York law, and a third-party to the transfer, such as Kryvoshey, does not have standing to attack the transfer. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 809-820 (*Mendoza*); see also *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 [borrower has standing to challenge void transfer].)

In her supplemental reply brief, Kryvoshey explains the basis for her wrongful foreclosure cause of action, as alleged: "[W]hile certain [defendants] purported to have attempted to purchase and securitize her loan by pooling it with a number of other mortgages into a securitized trust, and then selling shares of that trust on the secondary market (a Real Estate Mortgage Investment Conduit, or "REMIC" trust), that transaction never actually occurred within the time permitted by 26 U.S.C. §860G. [Kryvoshey's]

warrant for this allegation is that although the federal statute requires a loan to be in the trust within 90 days of the closing date, in this instance, [Kryvoshey's] Deed of Trust together with the Note were not transferred to the American Home Mortgage Assets Trust 2006-5 Trust until early 2011, nearly 5 years after the closing date of the trust, when [defendants] attempted, for the first time, to assign the Note and Deed of Trust to the REMIC. [Kryvoshey] also alleges that the Note and Deed of Trust were not duly endorsed, transferred and delivered to the REMIC trust in any other matter. Therefore, according to the [second amended complaint], because [defendants] were not actually the owners of the Subject Loan, nor the agents of the owners of the Subject Loan, pursuant to Cal. Civ. Code §2924, they had no right to foreclose on the Subject Property." (Fn. and record citations omitted.)

To summarize, Kryvoshey based her wrongful foreclosure cause of action on two alleged defects in the transfer of her loan to the trust which she claims make the transfer of her loan void. First, her loan was not transferred to the trust within 90 days of the trust's closing date, as required to obtain favorable tax status. And second, the note and deed of trust were not duly endorsed, transferred, and delivered. We rejected each of these arguments in *Mendoza, supra*, 6 Cal.App.5th 802. We held that a post closing-date transfer into a New York securitized trust renders the transfer merely voidable under the applicable New York laws, and a borrower (as a third party to the transfer) does not have standing to challenge alleged irregularities in the transfer that render the transfer voidable but not void. (*Id.* at pp. 804-805.) We also held that procedural deficiencies in the transfer also do not render that transfer void. (*Id.* at p. 819.)

Because Kryvoshey does not have standing to attack a voidable transfer to which she was not a party, the trial court properly sustained the demurrer on her first cause of action for wrongful foreclosure as that cause of action was alleged in the complaint.

Yet Kryvoshey argues in her reply brief on appeal that her wrongful foreclosure cause of action is viable on a different theory. She claims that, since defendants violated

the HAMP guidelines in denying her loan modification application, the later foreclosure was wrongful. For this theory, she cites *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1306-1307 (*Majd*). Although defendants filed a supplemental brief, they did not respond to this wrongful foreclosure theory based on *Majd*.

In *Majd*, the court held that a wrongful foreclosure cause of action could be based on a lender's foreclosure after failure to complete the HAMP loan modification process in good faith. The facts of that case are somewhat different from the facts here. In that case, the lender entered into the HAMP loan modification process with the borrower but, at the same time, pursued foreclosure on the property. The lender also falsely claimed that the borrower failed to produce required documentation. Under such circumstances, foreclosure was not authorized. (*Majd, supra,* 243 Cal.App.4th at p. 1307.) Here, defendants put Kryvoshey on a TPP, with which she fully complied, but defendants failed to make a permanent HAMP loan modification offer. We conclude Kryvoshey may be able to allege facts supporting a wrongful foreclosure cause of action and should be allowed to amend on remand.

Responding generally to Kryvoshey's wrongful foreclosure cause of action, defendants assert she cannot maintain the cause of action because she did not tender the amount of the loan. While tender of the amount of the loan is an element of a wrongful foreclosure cause of action, it is excused when a lender fails to complete the HAMP loan modification process in good faith. (*Majd, supra,* 243 Cal.App.4th at p. 1307.)

"Contrary to long-standing rules generally precluding a party from changing the theory of the case on appeal [citations], a plaintiff may propose new facts or theories to show the complaint can be amended to state a cause of action, thereby showing the trial court 'abused its discretion' ([Code Civ. Proc.,] § 472c, subd. (a)) in not granting leave to amend. The plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citations.]" (*Connerly, supra,* 229 Cal.App.4th at p. 460, fn. omitted.)

We therefore conclude that, even though Kryvoshey's first cause of action was not viable as pleaded, we must remand and give her the opportunity to amend to allege a viable wrongful foreclosure cause of action.

DISPOSITION

The judgment is reversed and remanded. The trial court is directed to vacate its order on demurrer and to enter a new order (1) sustaining the demurrer on the first cause of action for wrongful foreclosure with leave to amend, (2) overruling the demurrer on the second cause of action for promissory estoppel, the third cause of action for breach of contract, the fourth cause of action for negligence, the fifth cause of action for promissory fraud, and the sixth cause of action for fraud, and (3) sustaining the demurrer without leave to amend on the seventh cause of action for unfair competition. Kryvoshey is awarded her costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/S/
MAURO, Acting P. J.

We concur:

/S/
DUARTE, J.

/S/
RENNER, J.